"interim" rule.[139] As the D.C. Circuit recently held, "even an interim rule expected to be in place for only a brief time is subject to review, or agencies would be free to act unreasonably for that time."[140] When reviewing an interim rule, the D.C. Circuit has held,

> a reviewing court's task is not merely to rubber-stamp an agency decision; it is to ensure that the agency took a "hard look" at all relevant issues and considered reasonable alternatives to its decided course of action. . . . In short, the key to the arbitrary and capricious standard is its requirement of reasoned decisionmaking: we will uphold the Commission's decision if, but only if, we can discern a reasoned path from the facts and considerations before the Commission to the decision it reached.[141]

E. The 1996 Act's Incidental InterLATA Service Provisions Require Elimination of Section 22.903

The Commission acknowledges that the 1996 Telecom Act permits the BOCs to engage immediately in the provision of "incidental" interLATA services in-region "without establishing separate affiliates."[142] The Commission further notes that the statute "authorizes immediate market entry by BOCs for the provision of . . . CMRS on a non-'1+' equal access basis."[143] The Commission asks whether this bears on the retention or elimination of Section 22.903 and tentatively concludes that it does not limit its authority to retain the rule or prescribe a modified rule.[144]

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139 *Competitive Telecommunications Association v. FCC*, 87 F.3d 522, 1996 U.S. App. LEXIS 16138 at *30 (D.C. Cir. 1996).

140 *Id.* (*citing Union of Concerned Scientists v. Nuclear Regulatory Commission*, 229 U.S. App. D.C. 92, 711 F.2d 370, 379 (D.C. Cir. 1983) ("So long as we can grant meaningful relief affecting the controversy that precipitated the litigation, we may, in the interest of sound judicial administration, afford that relief . . . upon review of the interim rule.")).

141 *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 639 (D.C. Cir. 1984) (reviewing interim processing procedures) (citations omitted) (*citing Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42-43 (1983) (agency must consider reasonable alternatives); *Telocator Network v. FCC*, 691 F.2d 525, 545 (D.C. Cir. 1982) (agency must consider all relevant factors); *Action for Children's Television v. FCC*, 564 F.2d 458, 478-79 (D.C. Cir. 1977) (agency must give relevant factors a "hard look").

142 *NPRM* at ¶ 84.

143 *Id.* at ¶ 85.

144 *Id.* at ¶¶ 84-86.

BellSouth submits that the Commission has answered its own inquiry: "The 1996 Act permits the BOCs to immediately engage, without establishing separate affiliates, in specified in-region interLATA services that the Act defines as 'incidental.'"[145] Congress specifically considered whether interLATA CMRS should be subject to a separate affiliate requirement and decided that it should not. This necessarily includes the ability to provide intraLATA CMRS as well, because CMRS providers provide interLATA service only as part of their intraLATA offering.[146] Accordingly, when Congress determined that BOCs should be permitted to engage in interLATA CMRS as an incidental interLATA service without a separate affiliate, it implicitly prohibited the Commission from requiring a separate affiliate for CMRS in general.

The Commission's theory that it may nevertheless require either a structurally or nonstructurally separated affiliate for BOC provision of CMRS is premised entirely on Section 272(f)(3), which the Commission says "specifically preserves 'the authority of the Commission, under any other section of the Act to prescribe safeguards consistent with the public interest, convenience and necessity.'"[147] The Commission reads too much into Section 272(f)(3). This is part of Section 272(f), which specifies the "sunset" dates of the separate affiliate requirements for manufacturing, long-distance, and interLATA information services. The limited scope of Section 272(f)(3) is readily apparent from its full text:

> (f) SUNSET.—
>
> . . . .
>
> (3) PRESERVATION OF EXISTING AUTHORITY.— Nothing *in this subsection* shall be construed to limit the authority of the

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145 *Id.* at ¶ 84.

146 There are two forms of interLATA CMRS: (1) transmission of CMRS services across LATA boundaries within a single CMRS network that covers more than one LATA, and (2) provision of interLATA long-distance service to CMRS customers. Neither of these can logically be performed on a purely stand-alone basis.

147 *NPRM* at ¶ 85.

> Commission under any other section of this Act to prescribe safeguards consistent with the public interest, convenience, and necessity.[148]

Because it refers to "this subsection," all that Section 272(f)(3) "preserves" is the Commission's authority to prescribe safeguards for the activities that are subject to statutory separate affiliate requirements, after the Section 271(f) "sunset" dates. Section 272(f)(3) clearly could not be read as giving the Commission the authority to override the express determination of Congress, in Sections 271(b)(3) and 272(a)(2)(B)(i), that BOCs may provide incidental interLATA services, including CMRS, without a separate affiliate.

II. BELLSOUTH SUPPORTS THE PROPOSED SAFEGUARDS FOR LEC PROVISION OF CMRS, WITH MODIFICATIONS

In Part VI of the *NPRM,* the Commission proposes to adopt a number of non-structural safeguards for the provision of CMRS services by LECs. These proposed safeguards would apply to both cellular (in- and out-of-region) and PCS (in-region only), and would not be limited to the BOCs. BellSouth agrees that any safeguards should be evenhanded and symmetrical. Accordingly, BellSouth supports adoption of the proposed safeguards, with certain modifications discussed herein.

A. Any Safeguards Adopted Should Apply Uniformly to the Provision of Cellular, Broadband PCS, and Covered SMR Services by Non-Rural LECs In-Region

1. Cellular, Broadband PCS, and Covered SMR Should Be Subject to the Same Safeguards

The *NPRM* largely endorses the notion of regulatory parity among cellular and PCS, but inquires whether there may be reasons justifying different regulatory treatment at this time.[149] BellSouth submits that regulatory parity among competing services should be controlling. Where there is a competitive marketplace, the Commission should not adopt rules that handicap or prefer

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148 47 U.S.C. § 272(f)(3) (emphasis added).

149 *NPRM* at ¶ 108.

one competitor over others. Regulations should be evenhanded vis-à-vis competing service providers. The mere fact that one competitor is a new entrant does not justify protecting that competitor from competitive forces, giving it special preferences, or imposing additional regulations on incumbents.

In competitive markets, new entrants must incur the costs of entry. They have to purchase the facilities and resources needed for their start-up, and their decision to enter is based on a business plan that takes those costs into account. The fact that one of the resources needed to enter the broadband CMRS market is an FCC license for the use of spectrum, which must be bought at a market price either from the FCC (at auction) or from an incumbent, does not justify the Commission's skewing the rules of competition to favor the new entrant.

BellSouth submits that the scope of regulatory parity properly extends to all services involving spectrum dedicated to similar purposes, which can be expected to compete on the basis of price, quality, and service. The Commission has repeatedly recognized that all broadband wireless services—cellular, broadband PCS, and "covered" SMR—are similar in purpose and compete with each other. Accordingly, any regulatory safeguards adopted in this proceeding should apply equally to these three categories of service. Non-broadband services, such as narrowband PCS, paging, and non-covered SMR, on the other hand, are not similar to the broadband wireless services and are unlikely to compete with them except on the margins. Accordingly regulatory parity does not warrant subjecting these narrowband services to the safeguards under consideration.

2. Safeguards Should Apply Only to In-Region Service

BellSouth agrees with the Commission's proposal to apply nonstructural safeguards to PCS only in-region,[150] but the safeguards should likewise apply to cellular and covered SMR services

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150 *NPRM* at ¶ 114.

only when provided in-region. The Commission appears to acknowledge that the same policies should apply to cellular and PCS by cross-referencing its tentative decision not to require structural separation for BOC out-of-region cellular service.[151] Nevertheless, the *NPRM* does not specifically propose to exempt out-of-region cellular service from the non-structural safeguards, only PCS. BellSouth urges the Commission to correct this apparent oversight and exempt out-of-region cellular (and, similarly, SMR) service from the non-structural CMRS safeguards. Symmetrical treatment is clearly warranted under the principle of regulatory parity, given that there is no reasoned basis for distinguishing between these services with respect to the applicability of the safeguards.

3. A 10 MHz Exception, If Adopted, Should Include Cellular, Broadband PCS, and Covered SMR Spectrum

The Commission seeks comment on whether there should be an exception to the non-structural CMRS safeguards for LECs holding 10 MHz PCS licenses.[152] BellSouth agrees that "existing accounting safeguards are adequate" for LEC provision of services utilizing only 10 MHz of spectrum, but the exception should be modified to permit a LEC to use up to 10 MHz of any broadband CMRS spectrum—broadband PCS, cellular, or covered SMR—without additional safeguards, and not limit eligibility to 10 MHz broadband PCS licenses.

This modification is important because the Commission is in the process of allowing the disaggregation of CMRS spectrum.[153] A LEC wishing to provide specialized services requiring no more than 10 MHz of spectrum should ultimately have the flexibility to obtain any technically suitable spectrum to employ for such services, including disaggregated spectrum, and not be limited

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151 *Id.*

152 *Id.* at ¶ 113.

153 *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees*, WT Docket No. 96-148, *Notice of Proposed Rule Making*, FCC 96-287 (July 15, 1996).

to the designated 10 MHz PCS licenses (D, E, and F Block). This would also promote regulatory symmetry among the broadband CMRS services.

The Commission should also make clear that the 10 MHz exception is available even though the LEC may have other broadband CMRS spectrum attributable to it. A LEC's ability to offer specialized wireless services on an integrated basis, without additional safeguards, should not depend on whether the LEC or its affiliates hold additional broadband spectrum that remains subject to those safeguards (subject, of course, to the 45 MHz spectrum cap). In other words, the fact that a LEC's affiliate holds a 25 MHz cellular license that is subject to safeguards should not prevent the LEC from using a 10 MHz broadband PCS license for provision of wireless local loop services under the exception.

4. The Safeguards Should Apply Equally to All LECs Not Classified as "Rural Telephone Companies," Instead of Tier 1 LECs

The Commission has proposed to apply its nonstructural safeguards to all Tier 1 LECs, because small, principally rural, telephone companies should not be unduly burdened.[154] BellSouth submits that the Commission's objective can be better achieved, and more evenhandedly, by applying the safeguards to all LECs not qualifying as "rural telephone companies" as defined in Section 3 of the Act. A rural telephone company is defined as follows:

> The term "rural telephone company" means a local exchange carrier operating entity to the extent that such entity—
>
> (A) provides common carrier service to any local exchange carrier study area that does not include either—
>
> (i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or
>
> (ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

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[154] *NPRM* at ¶ 115.

> (B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;
>
> (C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or
>
> (D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.[155]

Congress has made the determination that to the extent special consideration is to be given to small telephone companies serving rural areas, the telephone companies eligible for such consideration are those described in this definition. By contrast, the proposal in the *NPRM* to exempt all non-Tier-1 LECs would confer benefits on many medium- to large-sized LECs that Congress did not deem to be eligible for special consideration. Given that the focus of the Commission's concern is on the special circumstances of LECs serving rural communities, and not on size per se, employing the statutory definition would appear to better achieve the Commission's purposes and would avoid conferring an unwarranted exception on companies that Congress did not single out for special consideration.

B. Proposed Competitive Safeguards for LEC In-Region CMRS

While the *NPRM* discusses only PCS in proposing these safeguards, it seeks comment on whether they should apply equally to other forms of CMRS.[156] As discussed above, any nonstructural safeguards adopted should apply equally to all in-region broadband CMRS services. Accordingly, BellSouth's comments on the individual safeguards proposed in the NPRM are premised on application to all broadband CMRS providers on an in-region basis.

1. Requiring a Separate Affiliate Is Not Warranted

The Commission has proposed to require the use of a separate affiliate for LEC CMRS operations, based in large part on the fact that several BOCs, including BellSouth, have voluntarily

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155 47 U.S.C. § 153(37).

156 *NPRM* at ¶ 125.

chosen to employ a separate affiliate for their PCS or other CMRS operations. The Commission also suggests that requiring a separate affiliate is "consistent with the approach taken by Congress in the 1996 Act with respect to BOC entry into previously prohibited or restricted services."[157]

BellSouth submits that a separate affiliate requirement is not warranted. First, the fact that several BOCs have chosen, for their own business reasons, to utilize a new corporation for a particular line of business does not justify *requiring* the use of a separate affiliate. BellSouth chose to place its PCS operations in a specific corporate structure for internal business reasons. At some later date, or when applying for a different license, BellSouth might have equally compelling internal business reasons for placing some or all of its CMRS operations directly into its LEC subsidiary, BellSouth Telecommunications, Inc.

While a separate affiliate structure may make it marginally easier to separate costs, it achieves that objective only at the cost of maintaining a separate corporate structure that may not continue to be justified. In particular, the proposed bar on jointly-owned transmission and switching facilities may create inefficiencies that increase the cost of service to the public, outweighing any minimal benefit of easing the separation of costs. Moreover, a separate corporate structure requires costly duplication of functions even if separate employees, officers, and directors are not required. Moreover, a separate affiliate is not necessary to separate costs. The Commission has adopted cost-allocation and accounting rules that achieve the same objective when different services are combined in a single corporate organization.[158]

The fact that the 1996 Telecom Act requires the use of separate affiliates for BOC entry into heretofore prohibited or restricted services does not support the Commission's proposal to require a separate affiliate for CMRS. Indeed, it militates strongly against this approach. Congress could

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157 *Id.* at ¶ 117.

158 *See Joint Cost Order, supra.*

have required BOCs to employ a separate affiliate for services they were already permitted to offer, but it did not do so. Instead, it required such an affiliate only for those particular services addressed in the statute. This suggests that Congress did not intend to subject services such as CMRS to a separate affiliate requirement.

The Commission reached a similar conclusion in its recent *Payphone Order.*[159] It found that Congress had required the use of a separate affiliate in other sections of the Telecom Act, and that the fact that Congress did not require a separate affiliate for payphone service in Section 276 represented "a clear statement that nonstructural safeguards, rather than structural separation, are mandated."[160] It should reach the same conclusion here.[161]

2. The Proposed Accounting Safeguards Are Appropriate

BellSouth supports the accounting safeguards for LEC provision of CMRS proposed in paragraph 120 of the *NPRM.*

3. All Broadband CMRS Providers Should Be Subject to the Same CPNI Rules

BellSouth believes that Section 222 requires applying the same, consistent set of CPNI rules and policies to all telecommunications carriers. Accordingly, no telecommunications carrier or class

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159 *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* CC Docket 96-128, *Report and order,* FCC 96-388 (Sept. 20, 1996) (*Payphone Order*).

160 *Id.* at ¶ 145.

161 Finally, BellSouth reiterates, and incorporates by reference, its reasons for opposing the imposition of a separate affiliate requirement on non-dominant BOC out-of-region interLATA services. *See* BellSouth Comments, CC Docket 96-21 (filed March 13, 1996); BellSouth Reply Comments, CC Docket 96-21 (filed March 25, 1996). While the Commission nevertheless imposed a separate affiliate requirement for non-dominant BOC out-of-region interLATA service, BellSouth has sought judicial review of that decision. *See Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services,* CC Docket 96-21, *Report and Order,* FCC 96-288 (July 1, 1996), *pet. for review pending sub nom. BellSouth Corp. v. FCC,* No. 96-9051 (11th Cir. filed Sept. 9, 1996).

of telecommunications carriers should be subject to more onerous or less rigorous CPNI restrictions than apply to others. In this respect, BellSouth opposes subjecting only Tier 1 LECs (which includes only the BOCs and GTE) and dominant interexchange carriers (which currently includes, domestically, only the BOCs not employing a separate affiliate for out-of-region service) to CMRS CPNI requirements.[162] This would subject only the BOCs and GTE to such requirements, while exempting AT&T, MCI, Sprint, and WorldCom, which would be irrational. AT&T is the nation's largest interexchange carrier and one of its largest cellular and PCS operators. No possible cost-benefit analysis could justify such an exemption.

In particular, the Commission should not, and need not, adopt particular organizational and procedural requirements for the handling of CPNI. If the Commission does adopt such requirements, however, all telecommunications carriers should be subject to them and should be required to document their compliance with them. The notion that certain CPNI requirements would apply only to particular designated telecommunications carriers is contrary to the core purpose of Section 222, which is to safeguard customers' reasonable expectations of privacy. Customers' privacy expectations do not vary with the identity of the carrier, and are thus no more or less deserving of organizational or procedural protections simply because of their carrier's identity. Under these circumstances, it is difficult to see how the Commission could reasonably impose divergent CPNI protection requirements on different competing carriers on the basis of disparate cost/benefit analyses.

As BellSouth has stated in its comments in Docket 96-115, "telecommunications service," as used in Section 222, properly includes the full range of telephony products a carrier offers to customers in its role as a telecommunications service provider,[163] and CMRS offerings should not

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162 *See NPRM* at ¶ 121.

163 *See* BellSouth Comments, CC Docket 95-115, at ii, 7-10 (June 11, 1996).

be carved out as a separate service category.[164] If the Commission nevertheless separates CMRS from landline services offered by a telecommunications provider, there should be no further division of CMRS into a variety of subcategories. At a minimum, all CMRS offerings should be considered the same "service" for purposes of Section 222, including interLATA CMRS. Section 332 defines CMRS in a unitary fashion, without regard to the particular rule part or technology used.[165] Moreover, as the Commission has recognized, Section 332 requires symmetrical regulation of CMRS, eliminating regulatory distinctions among these various offerings.[166] Consistent with the approach of Section 332, all CMRS offerings should be within the same "telecommunications service" for purposes of Section 222, including the provision of "cellular long distance," which is merely a form of CMRS offered on an interLATA basis as an incidental interLATA service.[167]

4. Interconnection Safeguards Are Not Warranted

As set forth in Section I.B.3 above, Congress and the Commission have adopted a comprehensive scheme governing the interconnection of all telecommunications carriers, including CMRS, with LEC facilities. Further safeguards are clearly not warranted. The *NPRM* was adopted before the *Interconnection Order* and accordingly could not rely on the to-be-adopted rules for protection against interconnection abuse. The issuance of the *Interconnection Order* moots the Commission's proposal to adopt further interconnection safeguards.

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164 *See id.* at 10.

165 *See* 47 U.S.C. § 332(d)(1).

166 *See* 47 U.S.C. § 332; *Regulatory Treatment of Mobile Services,* Gn Docket No. 93-252, *Second Report and Order,* 9 F.C.C.R. 1411, 1492-93 (1994).

167 *See* 47 U.S.C. § 271(g)(3).

5. Network Information Disclosure Safeguards Are Not Warranted

Congress and the Commission have already addressed the nature of the network information safeguards needed, in Section 251 and the *Interconnection Order*. The *NPRM* was adopted before the *Interconnection Order* and accordingly could not rely on the to-be-adopted rules regarding network information disclosure. The issuance of the *Interconnection Order* moots the Commission's proposal to adopt further network information disclosure rules for CMRS.

C. Any Competitive Safeguards Adopted Should Sunset Within Three Years After They Become Effective

BellSouth agrees with the Commission's suggestion that any safeguards adopted in this proceeding for the provision of LEC in-region CMRS should sunset automatically after a specified period. Given the rapid licensing of PCS through auctions and the speedy development of local exchange competition, conditions are likely to change very rapidly, rendering the safeguards unnecessary in just a few years. BellSouth suggests that three years is an appropriate sunset period. In a three-year period, the vast majority of MTA PCS systems are likely to be fully operational, as will many BTA systems. Moreover, three years in the future, most major markets are likely to have vigorous local exchange competition from resellers, companies using purchased network elements for provision of local service, and facilities-based competitive local exchange carriers.

Today, IXCs either directly, or through existing business relationships with CAPs, are positioned to offer integrated facilities-based local and long-distance service to the vast majority of high-usage business customers. MCI has "already built local networks reaching 45% of [its]

business customers."[168] MFS recently announced that it expects within three years to have local facilities available in 85 cities, reaching 70% of all U.S. businesses,[169] and after merging with WorldCom, the fourth-largest IXC, it will be able to offer integrated local, long-distance, internet, and international services to businesses over these facilities.[170] Under these circumstances, BellSouth submits, the Commission would not be warranted in adopting a sunset date more than three years into the future.

CONCLUSION

The Sixth Circuit put the question to be answered on remand succinctly:

> If Personal Communications Service and Cellular are sufficiently similar to warrant the Cellular eligibility restrictions and are expected to compete for customers on price, quality, and services, . . . what difference between the two services justifies keeping the structural separation rule intact for Bell Cellular providers?[171]

The only reasoned answer to the Court's question, given the evidence available to the Commission, is that there is no difference between cellular and PCS that justifies disparate treatment. There is also no difference between the BOCs and other major LECs that justifies imposing structural

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168 Gerald Taylor, President, MCI Telecommunications Corp. (*quoted in* John J. Keller and Gautam Naik, *Merger Poses a Bold Challenge to Bells*, Wall St. J., Aug. 27, 1996, at A3.

169 Conference call with Bernard J. Ebbers, Chairman, WorldCom, Inc. and James Q. Crowe, Chairman, MFS Communications, Inc., and securities analysts (Aug. 26, 1996).

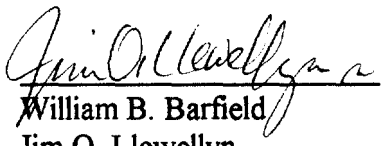
170 *See* Steven Lipin and Leslie Cauley, *WorldCom Reaches Pact to Buy MFS in $14.4 Billion Stock Deal*, Wall St. J., Aug. 26, 1996, at A3-4 ("'We will provide end-to-end service with one provider,' said Bernard J. Ebbers . . . . [A] WorldCom-MFS combination would be able to . . . [o]ffer true one-stop shopping for their corporate accounts. Under the WorldCom-MFS approach, customers would be able to buy local, long-distance, data and Internet services from a single carrier.").

171 *Cincinnati Bell*, 69 F.3d at 768.

separation on the BOCs alone. The Commission should eliminate Section 22.903 in its entirety and do so immediately.

Respectfully submitted,

BELLSOUTH CORPORATION

By: 

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October 3, 1996

Attachment 1
STAMP & RETURN

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)
	)
BellSouth Corporation	)
	)
Request for Authorization to Engage in Resale of Cellular Service Without Structural Separation Pursuant to Section 22.903 of the Commission's Rules	)

To: The Commission

REPLY TO COMMENTS IN RESPONSE TO REQUEST FOR RESALE AUTHORIZATION

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SUMMARY

BellSouth asked for authorization to resell cellular service on a structurally unseparated base to give its consumers a single point of contact for the telecommunications services that its companies offered (one-stop shopping). It showed that the policies underlying the cellular separate subsidiary rule — interconnection and cross-subsidy — would not be undermined by granting that request. BellSouth pointed out that the rule itself did not cover other Local Exchange Carriers (LEC) such as GTE, there were no FCC decisions chronicling any abuse, and the Commission has already ruled, in an analogous setting, that similar wireless offerings such as PCS or SMR service can be offered on an unseparated basis.

Consumer groups such as CWA, National Consumers League, and United Homeowner's Association support BellSouth's request as a "procompetitive, proconsumer" proposal. For example, the National Consumers League indicate that AT&T and Sprint are beginning to offer customers the convenience of one-stop shopping for long-distance, local, and cellular services. They point out, however, that in too many markets only one of the cellular providers can offer this option resulting in the charging of non-competitive premiums. Their conclusion: If the BellSouth request is granted, consumer choice and competitive pricing will be maximized. Northern Telecom adds that grant of the request will stimulate the growth of wireless services.

Only competitors opposed the request. None of the opponents showed why consumers should be deprived of competitive one-stop shopping. They could not legitimately claim that BellSouth's record of compliance with the structural separation indicated a risk of abuse. Rather, the opponents engage in rampant speculation and revisionist history, citing decade-old disagreements with unnamed Bell Companies (without disclosing the age of these instances) in an attempt to impugn BellSouth as likely to act anticompetitively. They ignore the fact that the interconnection policies and nonstructural safeguards adopted by the Commission have deterred and will continue to deter any such alleged abuses.

The disingenuous nature of the opposing commenters' filings was illustrated most clearly by the fact that, in recent Commission rulemakings concerning LEC eligibility to provide wireless services, many of them supported LEC participation in *facilities-based* wireless service without structural separation. Now they have flip-flopped when only cellular *resale* is at issue. The Commission should summarily dismiss these comments as not credible.

In the telecommunications industry, change is the status quo as companies move rapidly to position themselves in order to meet consumer needs in a new era. For example, AT&T recently merged with McCaw, after the Commission approved its request, and now has announced a fundamental restructuring designed to achieve a number of consumer-oriented goals. Indeed, it has advertised its ability to provide one-stop shopping for a panoply of telecommunications services.

BellSouth's much more limited request is no less important to it and its customers. It seeks to provide one-stop shopping through the resale of cellular service provided through the organizational structure which it deems most beneficial for its customers. BellSouth and its customers should be granted this option through expeditious approval of its request for cellular resale authorization.

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To: The Commission

REPLY TO COMMENTS IN RESPONSE TO REQUEST FOR RESALE AUTHORIZATION

Pursuant to Section 1.45(b) of the rules, BellSouth Corporation ("BellSouth"), on behalf of its wireline and wireless companies, hereby replies to the comments filed in response to its August 25, 1995 Request for Resale Authorization ("Resale Request").

INTRODUCTION

BellSouth showed in its Resale Request that allowing BellSouth's local exchange carrier ("LEC") subsidiary, BellSouth Telecommunications, Inc. ("BST"), and BellSouth's structurally

unseparated PCS subsidiary, BellSouth Personal Communications, Inc. ("BPCI"),[1] to resell cellular service as any other reseller would achieve the following Commission objectives and policies:

- Bring consumers the benefits of one-stop shopping for telecommunications services.
- Further LEC involvement in the provision of wireless services, resulting in the benefits of economies of scope.
- Promote unrestricted cellular resale competition.
- Avoid the creation of opportunities or incentives for cross-subsidization and interconnection abuse, given the Commission's existing interconnection policies and non-structural safeguards.
- Equalize the regulation of competing services and providers by eliminating disparate regulation between cellular and PCS and between Bell Companies and non-Bell LECs such as GTE.

No commenter seriously contested that an expeditious grant of the Resale Request would serve these objectives.

BellSouth's Resale Request is consumer-driven. BST wants to be able to meet the needs of consumers for convenient and simple "one-stop shopping" for a full range of wired and wireless telecommunications services. BPCI also wants to meet the needs of its PCS customers for dual-mode wireless service that will allow them to use cellular service as well as PCS. Not surprisingly, BellSouth's proposal drew strong support from consumer and other organizations because it will

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[1] BellSouth herein uses the term "structurally unseparated" to mean not structurally separated in conformance with the cellular structural separation rule, 47 C.F.R. § 22.903. BPCI is a separate corporation with separate facilities and employees from those of BST, but BPCI is not structurally separated in the manner specified by § 22.903. BPCI is currently the holder of 30 MHZ broadband PCS licenses for MTAs 6 and 44 for the benefit of a partnership to which the licenses will ultimately be transferred, subject to Commission consent.

increase consumer choice and convenience and increase efficiency.[2] Other Bell Companies also strongly supported the Resale Request.[3]

The only opposition came from competing companies who have an economic interest in preventing BellSouth and the other Bell Companies from serving consumer needs in an efficient manner.[4] None of these commenters disputed that consumers will benefit from "one-stop shopping" or that the Commission has found such benefits in the public interest. None attempted to justify the application of structural separation to BellSouth while GTE, a far larger LEC than any Bell Company, is not subject to any such restriction.[5] AT&T, the only commenter even acknowledging this disparity,

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[2] *See* Letter to Hon. Reed E. Hundt from Linda F. Golodner, President, National Consumers League (Sept. 18, 1995) ("Consumers League Comments"); Letter to Hon. Reed E. Hundt from Jordan Clark, President, United Homeowners Association (Sept. 13, 1995) ("United Homeowners Comments"); Comments of Communications Workers of America In Support of BellSouth Petition (Sept. 14, 1995) ("CWA Comments"); Comments of Northern Telecom Inc. (Sept. 18, 1995) ("Nortel Comments").

[3] *See* Bell Atlantic Comments (Sept. 18, 1995); Comments of SBC Communications Inc. in Support of BellSouth's Request for Authorization and Request for Similar Authorization (Sept. 18, 1995) ("SBC Comments"); Comments of Pacific Bell Mobile Services (Sept. 18, 1995) ("PBMS Comments"); Comments of U S WEST, Inc. (Sept. 18, 1995) ("USW Comments").

[4] *See* Comments of Airlink, L.L.C. (Sept. 18, 1995) ("Airlink Comments"); AT&T Wireless Services, Inc., Comments on Request for Resale Authorization (Sept. 18, 1995) ("AT&T Comments"); MCI Comments (Sept. 18, 1995); National Wireless Resellers Association, Opposition to "Request for Resale Authorization" (Sept. 18, 1995) ("Resellers Comments"); Nextel Communications, Inc., Comments on BellSouth's Request for Resale Authorization (Sept. 18, 1995) ("Nextel Comments"); Comments of Radiofone (Sept. 18, 1995) ("Radiofone Comments"); Sprint Telecommunications Venture Comments in Opposition to BellSouth Waiver Request (Sept. 18, 1995) ("Sprint Comments").

[5] The FCC has an obligation to treat similarly situated regulatees in the same way. *See Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965). In particular, the Commission has held that "equaliz[ing] the regulatory requirements applicable to all mobile service providers by allowing competing operators to offer the same portfolio of service options and packages . . . is required by Congress' mandate that comparable mobile services receive similar regulatory treatment." *Eligibility for the Specialized Mobile Radio Services*, GN Docket 94-90, *Report and Order*, 10 F.C.C.R. 6280, 6300 (1995); ("*SMR Eligibility*"); *see* 47 U.S.C. § 332(a); *Regulatory Treatment of Mobile Services*, GN Docket 93-252, *Second Report and Order*, 9 F.C.C.R. 1411, 1418 (1994) ("CMRS Second Report and Order").

admitted that "BellSouth may be correct that there is no basis for distinguishing between [Bell Companies] and other LECs."[6]

The public interest determinations underlying BellSouth's request have already been made in recent FCC proceedings. The Commission there has already determined that the Bell Companies and other local exchange carriers should be allowed to participate fully in the rapidly growing wireless services area (*e.g.*, PCS and SMR). None of the opposing commenters even acknowledged that their insistence on the need for structural separation for cellular resale flies directly in the face of these FCC decisions that structural separation is unnecessary for facilities-based LEC participation in wireless services and actually contrary to the public interest.[7]

In lieu of reasoned argument, the opposing commenters offer only revisionist history and speculation. They do not show that there are currently any significant problems of discriminatory interconnection or cellular cross-subsidization by either the many LECs who are *not* structurally separated or the Bell Companies. Moreover, they do not show that structurally unseparated resale will give BellSouth any new incentives or opportunities to act anticompetitively. To justify barring BellSouth from structurally unseparated cellular resale, they simply assume that BellSouth will act

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[6] AT&T Comments at 6 n.11. AT&T's suggested solution, assuming an unfair disparity exists, is to commence a rulemaking to extend the cellular structural separation requirement to *all* LECs. *Id.*

[7] The FCC has found that allowing LECs to provide PCS to their wireline customers directly "may produce significant economies of scope between wireless and PCS networks," would "promote more rapid development of PCS," would "yield a broader range of PCS services at lower costs to consumers," and would "encourage LECs to develop their wireline architectures to better accommodate all PCS services." *New Personal Communications Services,* GN Docket 90-314, *Second Report and Order,* 8 F.C.C.R. 7700, 7751 (1993) (*"PCS Second Report and Order"*) (subsequent history omitted). The Commission found that it would "jeopardize, if not eliminate" these benefits if LECs could only offer PCS through a structurally separated subsidiary. *Id.* at 7752. *See also SMR Eligibility,* 10 F.C.C.R. at 6288-94.

anticompetitively, that the Commission's non-structural safeguards are ineffectual, and that BellSouth's presumed illegal actions will escape detection by competitors and regulators alike.

Many of these opposing commenters recently supported FCC proposals in rulemaking proceedings to allow the Bell Companies and other LECs to provide cellular, PCS, and SMR services without any structural separation. Now it serves their interests to forestall competition, so they claim the sky will fall if BellSouth is permitted to resell cellular service without structural separation. Moreover, to keep BellSouth from responding to consumer demands for one-stop shopping for a variety of services, the opposing commenters urge the Commission to delay a decision until telecommunications legislation has been enacted and a slew of rulemakings started and competed—in other words, delay as long as possible. Such blatantly anticompetitive tactics should not be countenanced. The public interest clearly will be served by an expeditious grant.

I. Limited Nature of the Resale Request

At the outset, BellSouth wishes to emphasize the limited nature of its request. Most simply, BellSouth asks that its subsidiaries such as BST (its LEC subsidiary), and BPCI (its PCS subsidiary), be allowed to purchase cellular numbers and airtime in bulk from licensed cellular carriers on wholesale terms and conditions available to others, and resell that cellular service under their own names to their respective customers in conjunction with the sale of other telecommunications services.

This request will not affect in any way the structural separation of BellSouth's cellular subsidiary, BellSouth Mobility Inc ("BMI").[8] BMI will continue to exist as a structurally separated

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[8] BMI is a subsidiary of BellSouth Corporation, not BST, and is structurally separated from BST pursuant to Section 22.903. BMI provides cellular service both directly and through a variety of partnerships with other wireline telephone companies and their affiliates. Another Section 22.903 structurally separated subsidiary of BellSouth Corporation, American Cellular Communications Corporation ("ACCC"), provides cellular service through partnerships with nonwireline companies, including AT&T. All references herein to "BMI" are intended to include BMI, ACCC, and the

subsidiary, pursuant to § 22.903, and it will continue to act independently in the provision of cellular service. It will continue to sell cellular service to existing and new customers, both wholesale and retail, directly and through a variety of sales and marketing channels.[9] BST and BPCI will not supplant those channels, but would complement them by making resold cellular service available through their own distribution channels. BMI's cellular facilities and operations will remain independent of LEC control.

In short, grant of BellSouth's request:

- Will not affect the structurally separated ownership or operation of cellular facilities—all cellular facilities will remain under BMI.
- Will not result in structurally unseparated facilities-based cellular service—facilities-based cellular service would be provided by BMI, not BST.
- Will not result in the transfer of BMI's sales or marketing staff to BST—BMI will continue to use its own cellular sales and marketing staff as well as other channels such as partners and agents.
- Will not change the interconnection arrangements between BMI and the local LEC—BMI would continue to obtain interconnection from local LECs on the same basis as other cellular carriers.
- Will not result in the transfer of customer proprietary network information ("CPNI") from BST to BMI—BMI would retain access only to its own customers' CPNI.
- Will not result in sales or promotion by BST on behalf of BMI's cellular service—BST will not be BMI's agent, but a reseller, selling cellular service on its own account under its own name.
- Will not result in the sale of substantially all BMI's capacity to BST—BMI will preserve its ability to comply with its common carrier obligation to provide service on a nondiscriminatory basis to others upon reasonable request.[10]

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partnerships through which they provide cellular service.

[9] The channels through which BMI's cellular service is sold include BMI's own retail organization, the partnerships holding licenses, BMI's partners in such partnerships, and agents.

[10] *See Regulatory Treatment of Mobile Services,* GN Docket 93-252, *Fourth Report and Order,* 9 F.C.C.R. 7123, 7125 (1994) ("*CMRS Fourth Report and Order*").

- Will not result in any changes to BMI's maintenance of separate books and records.
- Will not result in any transfer of control over BMI to BST.

BellSouth will continue to comply with the requirements of Section 22.903 concerning the structural separation of cellular service, in all respects but one — structurally unseparated BellSouth entities would *resell* cellular service, just as other resellers do.

A. BellSouth Seeks a Company-Specific Authorization or Waiver

BellSouth's Resale Request was properly formulated as a request for "authorization" because Section 22.903 requires structural separation *except as otherwise authorized.* The rule clearly contemplates that exceptions will be considered on a case-by-case basis, and the Commission has indicated that it will individually address requests by particular Bell Companies.[11]

Nonetheless, if the Commission finds that a waiver is the appropriate vehicle for granting such an authorization, BellSouth asks that its filing be considered as a request for waiver, pursuant to Section 22.119.[12] BellSouth has met the requirements for a waiver by showing that (1) the underlying purposes of § 22.903—prevention of cross-subsidization and discriminatory interconnection—are achieved by allowing structurally unseparated resale while maintaining a structurally separated subsidiary for facilities-based service, and grant of the waiver would serve the public interest; and (2) in light of the factual circumstances, application of the rule would be inequitable and contrary to the public interest.

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[11] For example, in the *BOC Separation Order,* 95 F.C.C.2d 1117, 1140 (1983) (subsequent history omitted), the Commission said that it would make case-by-case determinations regarding individual Bell Companies' proposed deviations from the separate subsidiary requirements of the rules governing cellular, enhanced services, and CPE.

[12] 47 C.F.R. § 22.119.

BellSouth's request is limited only to seeking authorization to engage in the "provision of cellular service"[13] as a *non-facilities-based* reseller. Grant of BellSouth's Resale Request will not change the core requirements of Section 22.903 in any way. It will simply give BellSouth the flexibility to respond to consumer demands for a broader range of telecommunications services from a single provider, as other providers are able to do now.[14] Grant of the request will expand consumer options, not lessen them. Customers will be able to obtain cellular service from any of BMI's many existing distribution channels, from a competing cellular carrier, or from a reseller, as now, but they will also be able to obtain it from the local BST business office. Figures 1 and 2 below are "before" and "after" diagrams that show how the range of services available to consumers from BellSouth will be expanded by grant of the Resale Request.

The opponents of BellSouth's request would delay making such choices available to consumers. They ask the Commission to await the enactment of telecommunications legislation or to complete a variety of miscellaneous pending and yet-to-be initiated rulemakings, rather than grant BellSouth's very limited request for resale authorization now. These naked pleas for competitive

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[13] Recently, the staff announced for the first time that cellular resale constitutes the "provision of cellular service," thus requiring structural separation under Section 22.903 unless otherwise authorized. *BellSouth Corp., Declaratory Ruling,* DA 95-1401 (W.T.B. June 22, 1995).

[14] AT&T can offer its customers a single point of contact for purchasing interexchange service, cellular service, PCS service, and CPE, and it can act as its customers' agent for obtaining wireline service from the LEC. As local exchange competition is authorized, AT&T will be free to provide local exchange service directly as well. Grant of this waiver will allow BST to provide a single point of contact for purchasing local exchange service, cellular service, PCS service, and CPE, as well as designation of a primary interexchange carrier, pursuant to equal access requirements.